

## **EDUCATION DEPARTMENT [281]**

### **Adopted and Filed**

Pursuant to the authority of Iowa Code section 256.7(5), the State Board of Education hereby amends Chapter 41, "Special Education," Iowa Administrative Code.

These amendments make technical corrections to Chapter 41 resulting from revisions to the chapter in 2007, make technical corrections required by federal regulatory changes in 2007 and 2008, make clarifying changes regarding the role of general education, and make clarifying changes concerning child find and eligibility determinations.

An agencywide waiver provision is provided in 281—Chapter 4.

Notice of Intended Action was published in the August 26, 2009, Iowa Administrative Bulletin as ARC #8050B. A public hearing was held at 16 sites over the Iowa Communications Network (ICN) on October 13, 2009, and public comments were allowed until 4:30 p.m. on October 13, 2009.

One person attended the public hearing. Two written comments were received. One comment, submitted by an AEA director of special education, was entirely favorable to the rules. The other comment was submitted by the sole person to attend the public hearing, who is the director of a nonprofit organization that assists parents of children with disabilities, was also entirely favorable to the rulemaking. The commenter expressed concern that, in implementation, public agencies will not sufficiently honor parental requests to evaluate a child. The department has reviewed this concern and concludes the proposed rules adequately address it. A public agency must seek parental consent to evaluate whenever a disability is suspected, and a parent may request an evaluation at any time. A public agency, however, need not conduct an evaluation when requested by a parent if the public agency does not have information that would cause it to suspect the child has a disability; in that case, the public agency must provide a parent with prior written notice that an evaluation will not be conducted.

These amendments are identical to those published under Notice.

These amendments are intended to implement the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400-ff as implemented by 34 CFR Part 300) and Iowa Code chapter 256B.

These amendments become effective January 20, 2010.

The following amendments are adopted.

**ITEM 1.** Amend rule **281—41.8(256B,34CFR300)** as follows:

**281—41.8(256B,34CFR300) Child with a disability.** "Child with a disability" refers to a person under 21 years of age, including a child under 5 years of age, who has a disability in obtaining an education. The term includes an individual who is over 6 and under 16 years of age who, pursuant to the statutes of this state, is required to receive a public education; an individual under 6 or over 16 years of age who, pursuant to the statutes of this state, is entitled to receive a public education; and an individual between the ages of 21 and 24 who, pursuant to the statutes of this state, is entitled to receive special education and related services. In federal usage, this refers to infants, toddlers, children and young adults. In these rules, this term is synonymous with "child requiring special education" and "eligible individual." "Disability in obtaining an education" refers to a condition, identified in accordance with this chapter, which, by reason thereof, causes a child to require special education and support and related services.

**ITEM 2.** Amend rule **281—41.9(256B,34CFR300)** as follows:

**281—41.9(256B,34CFR300) Consent.**

**41.9(1) Obtaining consent.** "Consent" is obtained when all of the following conditions are satisfied:

a. The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or ~~other~~ through another mode of communication;

b and c. No change.

**41.9(2)** No change.

**41.9(3) Special rule.** If a parent of a child revokes consent, in writing, for the child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

**ITEM 3.** Amend subrule **41.18(3)**, introductory paragraph, as follows:

**41.18(3) Requirements for special education teachers teaching to alternate academic achievement standards.** When used with respect to a special education teacher who teaches core academic subjects exclusively to children who are assessed against alternate academic achievement standards established under 34 CFR 200.1(d), "highly qualified" means the teacher, whether new or not new to the profession, may either:

**ITEM 4.** Amend subrule **41.51(12)** as follows:

**41.51(12) School district of the child's residence.** "School district of the child's residence" or "district of residence of the child" is that school district in which the parent of the individual resides, subject to the following:

a and b. No change.

c. If an individual is physically present (“lives”) in an intermediate care facility, residential care facility, or other similar facility, the individual’s district of residence is deemed to be that of the individual’s parents.

€ d. “Children living in a foster care facility” are individuals requiring special education who are living in a licensed individual or agency child foster care facility, as defined in Iowa Code section 237.1, or in facility providing residential treatment as defined in Iowa Code section 125.2 an unlicensed relative foster care placement. District of residence of an individual living in a foster care facility and financial responsibility for special education and related services are determined pursuant to subrule 41.907(5)”a”. paragraph 41.907(5)”1.”

e. “Children living in a treatment facility” are individuals requiring special education who are living in a facility providing residential treatment as defined in Iowa Code section 125.2. District of residence of an individual living in a treatment facility and financial responsibility for special education and related services are determined pursuant to paragraph 41.907(5)”b.”

€ f. “Children placed by the district court” are pupils requiring special education for whom parental rights have been terminated and who have been placed in a facility or home by a district court. Financial responsibility for special education and related services of individuals placed by the district court is determined pursuant to subrule 41.907(6).

**ITEM 5.** Amend subrule **41.103(1)** as follows:

**41.103(1)** *All means available to meet Part B requirements.* The state may use whatever state, local, federal, and private sources of support that are available in the state to meet the requirements of Part B of the Act.

**ITEM 6.** Adopt the following new subrules:

**41.111(2)** *High-quality general education instruction; general education interventions.*

a. As a component of efficient and effective, high-quality general education instruction, it shall be the responsibility of the general education program of each LEA to provide additional support and assistance to all students who may need such additional support and assistance to attain the educational standards of the LEA applicable to all children. Receipt of such additional support and assistance, when considered alone, does not create a suspicion that a child is an eligible individual under this chapter. Activities under this paragraph shall be provided by general education personnel, with occasional or incidental assistance from special education instructional and support personnel.

b. General education interventions involving activities described in rule 281—41.312(256B,34CFR300) are a recognized component of an AEA’s child find policy pursuant to the policies set forth in subrule 41.407(1) and the procedures set forth in subrule 41.407(2).

**41.111(5)** *Evaluation required when disability is suspected.* At the point when a public agency suspects a child is a child with a disability under this chapter, the public agency must seek parental consent for an initial evaluation of that child, pursuant to subrule 41.300(1).

**41.111(6)** *Rule of construction—suspicion of a disability.* As a general rule, a public agency suspects a child is a child with a disability when the public agency is aware of facts and circumstances that, when considered as a whole, would cause a reasonably prudent public agency to believe that the child's performance might be explained because the child is an eligible individual under this chapter.

**ITEM 7.** Amend rule **281—41.118(256B,34CFR300)** as follows:

**281—41.118(256B,34CFR300)** **Children in public or private institutions.** Except as provided in rule 281—41.149(256B,34CFR300) regarding agency responsibility for general supervision ~~for~~ of some individuals in adult prisons, the department must ensure that rule 281—41.114(256B,34CFR300) is effectively implemented, including, if necessary, making arrangements with public and private institutions such as a memorandum of agreement or special implementation procedures.

**ITEM 8.** Adopt the following new subrule 41.156(6):

**41.156(6)** *Positive efforts to employ and advance qualified individuals with disabilities.* Each recipient of assistance under Part B of the Act must make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of the Act.

**ITEM 9.** Amend rule **281—41.211(256B,34CFR300)** as follows:

**281-41.211(256B,34CFR300)** **Information for department.** Each public agency shall provide the department with information necessary to enable the department to carry out its duties under Part B of the Act and this chapter, including, with respect to 34 CFR Sections Section 300.157 and ~~300.160~~, information relating to the performance of children with disabilities participating in programs carried out under Part B of the Act. This information, including such quantitative and qualitative data as the department may require, shall be submitted in a manner and at a time determined by the department. Failure to submit timely and accurate information may be considered by the department in making the determinations under rule 281—41.603(256B,34CFR300) or in taking any other action to enforce Part B of the Act or this chapter.

**ITEM 10.** Amend subrule **41.300(2)** as follows:

**41.300(2)** *Parental consent for services.*

a. and b. No change.

~~c. If the parent of a child fails to respond or refuses to consent to services under 41.300(2)“a,” the public agency may not use the procedural safeguards of this chapter, including the mediation procedures or the due process procedures under this chapter, to obtain agreement or a ruling that the services may be provided to the child.~~

~~d. If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency:~~

~~(1) Will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and~~

~~(2) Is not required to convene an IEP team meeting or develop an IEP for the child for the special education and related services for which the public agency requests such consent.~~

c. If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the public agency:

(1) May not use the procedural safeguards in this chapter, including the mediation procedures rule 281—41.506(256B,34CFR300) or the due process procedures under rules 281—41.507(256B,34CFR300) through 281—41.516(256B,34CFR300) in order to obtain agreement or a ruling that the services may be provided to the child;

(2) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and

(3) Is not required to convene an IEP team meeting or develop an IEP under rules 281—41.320(256B,34CFR300) and 281—41.324(256B,34CFR300) for the child.

d. If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency:

(1) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with rule 281—41.503(256B,34CFR300) before ceasing the provision of special education and related services;

(2) May not use the procedural safeguards in this chapter, including the mediation procedures rule 281—41.506(256B,34CFR300) or the due process procedures under rules 281—41.507(256B,34CFR300) through 281—41.516(256B,34CFR300) in order to obtain agreement or a ruling that the services may be provided to the child;

(3) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and

(4) Is not required to convene an IEP team meeting or develop an IEP under rules 281—41.320(256B,34CFR300) and 281—41.324(256B,34CFR300) for the child for further provision of special education and related services.

**ITEM 11.** Amend subrule **41.300(4)** as follows:

**41.300(4) Other consent requirements.**

a. No change.

b. Additional consent requirements. In addition to the parental consent requirements described in ~~subrule~~ subrules 41.300(1) through 41.300(3), the state may require parental consent for other services and activities under Part B of the Act and of this chapter if it ensures that each public agency in the state establishes

and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

c. Limitation on public agency's use of failure to give consent. A public agency may not use a parent's refusal to consent to one service or activity under subrules 41.300(1) through 41.300(3) or paragraph 41.300(4)“b” to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this chapter.

d and e. No change.

**ITEM 12.** Amend rule **281—41.312(256B,34CFR300)** as follows:

**281—41.312(256B,34CFR300) General education interventions.** Each LEA, in conjunction with the AEA, shall attempt to resolve the presenting problem or behaviors of concern in the general education environment prior to conducting a full and individual evaluation. In circumstances when ~~the development and implementation of general education interventions are not appropriate to the needs of the individual, the IEP team and, as appropriate, other qualified professionals, may determine that a full and individual initial evaluation shall be conducted~~ there is a suspicion that a child is an eligible individual under this chapter, the AEA or AEA in collaboration with the LEA shall conduct a full and individual initial evaluation. Documentation of the rationale for such action shall be included in the individual's educational record.

**41.312(1)** No change.

**41.312(2) Nature of general education interventions.** General education interventions shall include ~~teacher~~ consultation with special education support and instructional personnel ~~working collaboratively to improve an individual's educational performance.~~ The General education intervention activities shall be documented and shall include measurable and goal-directed attempts to resolve the presenting problem or behaviors of concern, communication with parents, collection of data related to the presenting problem or behaviors of concern, intervention design and implementation, and systematic progress monitoring to measure the effects of interventions.

**41.312(3) and 41.312(4)** No change.

**ITEM 13.** Adopt the following new rule **281—41.314(256B,34CFR300):**

**281—41.314(256B,34CFR300) Progress monitoring and data collection.**

**41.314(1) Evidence of progress in general education instruction.** Each public agency shall establish standards, consistent with those the department may establish, by which the adequacy of general education instruction, including the quality and quantity of data gathered, is assessed, and whether such data are sufficient in quantity and quality to make decisions under Part B of the Act and this chapter.

**41.314(2) Progress monitoring and determining eligibility.** Each public agency shall engage in progress monitoring of each individual's progress as the department may require during the process of evaluating whether a child is an eligible individual and shall record such progress in any manner that the department may permit or require. If the AEA or LEA serving an individual imposes additional requirements

for the monitoring of progress of individuals during the process of evaluation, personnel serving that individual shall comply with those additional requirements. The team determining the child's eligibility may increase the frequency with which the child's progress is monitored.

**41.314(3)** *Progress monitoring and eligible individuals.* Each public agency shall engage in progress monitoring of each eligible individual's progress as the department may require, and shall record such progress in any manner that the department may permit or require. If the AEA or LEA serving an eligible individual imposes additional requirements for the monitoring of progress of eligible individuals, personnel serving that individual shall comply with those additional requirements. An IEP team may increase the frequency with which an eligible individual's progress is monitored.

**ITEM 14.** Amend paragraph 41.320(1)“c” as follows:

c. For children with disabilities who take alternate assessments aligned to alternate academic achievement standards, a description of benchmarks or short-term objectives;

**ITEM 15.** Amend subparagraph 41.324(1)“b”(5) as follows:

(5) Consider whether the child needs assistive technology devices and services, including accessible instructional materials.

**ITEM 16.** Adopt the following new subrule **41.324(6)**:

**41.324(6)** *Rules of construction—instruction in Braille.* For an eligible individual for whom instruction in Braille is determined to be appropriate, as provided in 41.324(1)“b”(3), that eligible individual is entitled to instruction in Braille reading and writing that is sufficient to enable the individual to communicate with the same level of proficiency as an individual of otherwise comparable ability at the same grade level. Braille reading and writing instruction may only be provided by a teacher licensed at the appropriate grade level to teach individuals with visual impairments.

**ITEM 17.** Rescind subparagraph 41.408(2)“c”(1).

**ITEM 18.** Renumber subparagraphs 41.408(2)“c”(2) to (5) as 41.408(2)“c”(1) to (4).

**ITEM 19.** Rescind paragraph 41.408(2)“g.”

**ITEM 20.** Amend paragraph 41.412(2)“b” as follows:

b. When individuals enrolled in nonpublic schools are ~~dually~~ enrolled in public schools to receive special education instructional services, transportation provisions between nonpublic and public attendance centers will be the responsibility of the school district of residence.

**ITEM 21.** Amend paragraph 41.506(2)“g” as follows:

g. A written, signed mediation agreement is enforceable in any state court of competent jurisdiction or in a district court of the United States. ~~Discussions that~~

~~occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any federal court or state court.~~

**ITEM 22.** Adopt the following new paragraph **41.506(2)“h”**:

*h.* Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any federal court or state court.

**ITEM 23.** Adopt the following new subrule **41.600(5)**:

**41.600(5)** *Correction of noncompliance.* In exercising its monitoring responsibilities under subrule 41.600(4), the state must ensure that when it identifies noncompliance with the requirements of this chapter by an LEA, the noncompliance is corrected as soon as possible, but in no case later than one year after the state’s identification of the LEA’s noncompliance.

**ITEM 24.** Amend paragraph 41.602(2)“a” as follows:

a. Public report. The state must:

(1) Report annually to the public on the performance of each LEA located in the state on the targets in the state’s performance plan as soon as practicable but no later than 120 days following the state’s submission of its annual performance report under 41.602(2)“b”; and

(2) Make the state’s performance plan, the state’s annual performance reports, and annual reports on the performance of each LEA located in the state available through public means, including, at a minimum, by posting these documents on the Web site of the department, distribution to the media, and distribution through public agencies.

(3) No change.

**ITEM 25.** Amend rule **281—41.624(256B,34CFR300)** as follows:

**281—41.624(256B,34CFR300) Destruction of information.**

**41.624(1)** No change.

**41.624(2)** *Mandatory and permissive destruction of information.* The information must be destroyed at the request of the parents. However, a permanent record of a student’s name, address, and telephone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation. This permanent record must contain the information required by rule 281—12.3(256).

**41.624(3)** *Rule of construction—no longer needed to provide educational services to the child.* For purposes of this rule, “no longer needed to provide educational services” means that a record is no longer relevant to the provision of instructional, support, or related services and it is no longer needed for accountability and audit purposes. At a minimum, a record needed for accountability and audit purposes must be retained for five years after completion of the activity for which funds were used.



**ITEM 26.** Amend rule **281—41.815(256B,34CFR300)** as follows:

**281—41.815(256B,34CFR300) Subgrants to AEAs.** ~~Each state that receives a grant under Section 619 of the Act for any fiscal year must distribute all of the grant funds that the state does not reserve under rule 41.812(256B,34CFR300) to AEAs in the state that have established their eligibility under Section 613 of the Act. The state shall make subgrants to AEAs consistent with 34 CFR Section 300.815.~~

**ITEM 27.** Amend rule **281—41.817(256B,34CFR300)** as follows:

**281—41.817(256B,34CFR300) Reallocation of AEA funds.** ~~If the state determines that an AEA is adequately providing FAPE to all children with disabilities aged three to five residing in the area served by the AEA with state and local funds, the state may reallocate any portion of the funds under Section 619 of the Act that are not needed by that AEA to provide FAPE to other AEAs in the state that are not adequately providing special education and related services to all children with disabilities aged three through five residing in the areas the other AEAs serve. The state shall reallocate AEA funds under conditions listed and in a manner specified by 34 CFR Section 300.817.~~

**ITEM 28.** Amend rule **281--41.907(256B,282,34CFR300,303)** as follows:

**281—41.907(256B,282,34CFR300,303) Program costs.**

**41.907(1) to 41.907(4)** No change.

**41.907(5)** *Responsibility for special education for children living in a foster care facility or treatment facility.*

a. For eligible Eligible individuals who are living in a licensed individual or agency child foster care facility, as defined in Iowa Code section 237.1 or in a facility as defined in Iowa Code section 125.2, the LEA in which the facility is located must provide special education if the facility does not maintain a school, or in an unlicensed relative foster care placement shall remain enrolled in and attend an accredited school in the school district in which the child resided and is enrolled at the time of placement, unless it is determined by the juvenile court or a public or private agency of this state that has responsibility for the child's placement that remaining in such school is not in the best interests of the child. If such a determination is made, the child be enrolled in the district in which the child is placed and not in the district in which the child resided prior to receiving foster care. The costs of the special education required by this chapter, however, shall be paid, in either case, by the school district of residence of the eligible individual.

b. For eligible individuals who are living in a facility as defined in Iowa Code section 125.2, the LEA in which the facility is located must provide special education if the facility does not maintain a school. The costs of the special education, however, shall be paid by the school district of residence of the eligible individual.

c. If the school district of residence of the eligible individual cannot be determined and this individual is not included in the weighted enrollment of any LEA in the state, the LEA in which the facility is located may certify the costs to the director of education by August 1 of each year for the preceding fiscal year. Payment shall be made from the general fund of the state.

**41.907(6)** No change.

**41.907(7)** *Proper use of special education instructional and support service funds.* Special education instructional funds generated through the weighting plan may be utilized to provide special education instructional services both in state and out of state with the exceptions of itinerant instructional services under subrule 41.410(1) and special education consultant services which shall utilize special education support service funds for both in–state and out–of–state placements.

**41.907(8)** and **41.907(9)** No change.

**41.907(10)** *Procedures for billing under subrules 41.907(5) and 41.907(6).* The department may establish procedures by which it determines which district initially pays the costs of special education and related services and seeks reimbursement in situations where a parent of a child cannot be located, parental rights have been terminated, or parents are deceased.

**ITEM 29.** Amend paragraph **41.1002(1)**“a” as follows:

a. A request for a special education preappeal conference shall be made in the form of a letter which identifies the student, LEA and AEA, sets forth the facts, the issues of concern, or the reasons for the conference. The letter shall be mailed to the department, to the AEA, and to the LEA.